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IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1490

LAURA B. JACKSON and
LEROY JACKSON,
Petitioners,

vs.

DAVID C. WHERRY, M.D., et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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JURISDICTION

The petitioners have invoked the jurisdiction of the Supreme Court of the United States under 28 U.S.C. § 1234(1). The respondent, David C. Wherry, M.D., denies that jurisdiction is proper under such section of the United States Code. Further, diligent search of the Code fails to even disclose the existence of the claimed jurisdictional grounds. Subsequent discussion regarding jurisdiction herein will be in reference to 28 U.S.C. § 1257, the proper jurisdictional provision for review of the District of Columbia Court of Appeals by writ of Certiorari.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The petitioners have cited U.S. CONST. amend. XIV, § 1 as a provision involved in this case. Even assuming that the constitutional questions raised by petitioners herein were properly preserved for review by the District of Columbia courts, reliance on the Fourteenth Amendment is misplaced. The District of Columbia is not a "state" within the meaning of the Fourteenth Amendment, and neither the District nor its officers are subject to its restrictions. *See District of Columbia v. Carter,* 409 U.S. 418, 424, 93 S.Ct. 602, 34 L.Ed.2d 613, 620 (1973); *Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884, 886 (1954).

Additionally, the respondent cites 28 U.S.C. § 2101, Rule 22 of the Rules of the Supreme Court of the United States, and Rule 41 of the Rules of the District of Columbia Court of Appeals as applicable to this case.

QUESTIONS PRESENTED

1. Whether the time requirement of Rule 22 of the Rules of the Supreme Court of the United States for filing a Petition for Writ of Certiorari had expired before the filing herein?

2. Whether the jurisdiction of the United States Supreme Court fails where the federal constitutional questions are raised for the first time on Petition for Writ of Certiorari to the District of Columbia Court of Appeals?

3. Whether the United States Supreme Court will continue to decline review of District of Columbia judgments which rest on independent and adequate "state" grounds?

STATEMENT OF CASE

The petitioner's request for review by Writ of Certiorari to the District of Columbia Court of Appeals arises from an action in medical malpractice tried in the Superior Court of the District of Columbia, Civil Action No. 1906-77. At the second trial of this matter on September 6, 1978, the trial court instructed the jury on two aspects of negligence – lack of informed consent and general negligence. The jury returned a verdict for Dr. Wherry, respondent herein, on all counts, and judgment was entered accordingly.

On appeal to the District of Columbia Court of Appeals, judgment was affirmed in a memorandum opinion filed October 9, 1979. The mandate was stayed pending disposition of the petitioner's motion for reconsideration and for rehearing en banc, which was denied in an order filed December 5, 1979; the mandate issued December 12, 1979. At no stage in the proceedings were the federal questions sought to be reviewed raised by petitioners.

The petition for Writ of Certiorari to the District of Columbia Court of Appeals was filed on March 24, 1980.

ARGUMENT

I. The Petition for Writ of Certiorari to the District of Columbia Court of Appeals herein was not timely filed, nor do sufficient grounds exist to deem the requirement waived.

Rule 22 of the Rules of the Supreme Court of the United States states, in relevant part: "3. A Petition for Writ of Certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law." The applicable law regarding Supreme Court review of a

judgment in a civil action by Writ of Certiorari is found in 28 U.S.C. § 2101(c), which requires application within ninety (90) days subsequent to entry of judgment. Rule 41 of the Rules of the District of Columbia Court of Appeals provides that the mandate shall issue seven (7) days subsequent to the entry of an order denying a timely filed petition for rehearing. The motion for rehearing was denied on December 5, 1979, and accordingly, the mandate issued December 12, 1979. Therefore, the ninety (90) day period within which to file a timely Petition for Writ of Certiorari expired on March 11, 1980. The Petition herein was filed on March 24, 1980.

Although the Supreme Court has held that its Rule 22 is not jurisdictional and that it is subject to waiver by the Court in the exercise of its discretion when the ends of justice so require, *see e.g. Durham v. United States*, 401 U.S. 481, 91 S.Ct. 858, 28 L.Ed.2d 200, 202 (1971), Rule 22 is specific that applications for such extensions are not favored. With respect to the Petition herein, an acceptable reason for extension of the time for filing a Petition for Writ of Certiorari has not been made, even though the time period expired prior to the filing of the Petition for review. Respondent's contention is that no request for extension was made as no acceptable reason for extension of the time for filing a Petition for Writ of Certiorari exists. *See Brody v. United States*, 77 S.Ct. 910, 1 L.Ed.2d 1130 (1957, U.S.); *Carter v. United States,* 75 S.Ct. 911, 100 L.Ed. 1508 (1955, U.S.); *Knickerbocker Printing Corp. v. United States,* 75 S.Ct. 212, 99 L.Ed. 1292 (1954 U.S.). Accordingly, the Petition for Writ of Certiorari to the District of Columbia Court of Appeals should be denied for failure to meet the time requirements of Rule 22 of the Rules of the Supreme Court of the United States.

II. The United States Supreme Court's jurisdiction to review final judgments of the District of Columbia Court of Appeals fails where the federal constitutional issues are raised for the first time on Petition for Writ of Certiorari.

The record in this action, at both the trial and appellate stages , is devoid of any attempts to raise, preserve, or pass upon the federal constitutional issues which petitioners seek to have reviewed by this Court. It was very early established that the Supreme Court will not decide federal constitutional issues raised for the first time on review of state court decisions. *Crowell v. Randell,* 10 Pet. 368, 9 L.Ed. 458 (1836). The Supreme Court has consistently refused to decide federal constitutional issues raised for the first time on such review in a long line of cases subsequent to the *Crowell* opinion. *See e.g. Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1162, 22 L.Ed.2d 398, 400 (1969); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.,* 360 U.S. 334, 342, n. 7, 79 S.Ct. 1196, 3 L.Ed.2d 1280, 1286 (1959); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434-35, 60 S.Ct. 670, 84 L.Ed. 849 (1940); *Dewey v. Des Moines,* 173 U.S. 193, 197-201, 19 S.Ct. 379, 43 L.Ed. 665, 667-68 (1899); *Murdock v. City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1875). Accordingly, the Petition for Writ of Certiorari to the District of Columbia Court of Appeals should be denied as the federal constitutional issues are raised for the first time in the Petition.

III. District of Columbia judgments which rest on independent and adequate "state" grounds are not subject to review by the United States Supreme Court.

It is a recognized principal that the Supreme Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds for decision. *See e.g. NAACP v. Alabama* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *Fox Film Corp. v. Muller,* 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935). A prima facie case of medical malpractice in the District of Columbia consists of evidence to show the applicable standard of care, conduct that breaches that standard, and a causal relationship between the conduct and the injury complained of. *See Robbins v. Footer,* 179 U.S. App. D.C. 389, 392, 553, F.2d 123, 126 (1973); *Kosberg v. Washington Hospital Center,* 129 U.S. App. D.C. 322, 324, 394 F.2d 947, 949 (1968). From a review of the evidence in the record by the District of Columbia Court of Appeals, certainty that the petitioners herein even established a prima facie case of medical malpractice was not apparent. *Jackson v. Wherry,* No. 13970, Memorandum Opinion and Judgment, fn. 6 (October 9, 1979). Additionally, the petitioners herein failed to object to jury instructions prior to the jury retiring to deliberate. Such matters are not proper for appellate review where no objection is taken at trial. *Id.,* fn. 1; *Manes v. Dowling,* D.C. App., 375 A.2d 221, 224 (1977). Accordingly, the Petition for Writ of Certiorari to the District of Columbia Court of Appeals should be denied as the judgment of the District of Columbia Court of Appeals rests on independent and adequate "state" grounds.

CONCLUSION

The respondent, David C. Wherry, M.D., respectfully requests the Supreme Court of the United States to deny the Petition for Writ of Certiorari to the District of Columbia Court of Appeals filed herein by the petitioners.

Respectfully submitted,

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